89-673

NO. _____

IN THE

Supreme Court of the United States

OCTOBER TERM, 1989

JOHN YIAMOUYIANNIS,
Petitioner

v.

PAUL THOMPSON, EXPRESS NEWS,
BEXAR COUNTY MEDICAL SOCIETY
and DR. RANDALL PRIESSIG,
Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

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QUESTIONS PRESENTED

Do *Gertz v. Welch* and the First Amendment establish an absolute constitutional privilege for expressions of opinion?

Does *Gertz* protect the press when they conspire to publish false and contrived "opinion" intended to misrepresent the reputation of a person for the purpose of damaging his reputation?

Does *Gertz* establish a privilege for opinion statements regardless of malice?

Is it right to categorize malicious and false publications about character as "false ideas" protected by *Gertz* as a matter of law?

Where the relevant scientific facts are undisputed, does an expert's qualifications become a bona fide public issue?

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Respondents

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF TEXAS

To The Honorable Chief Justice And Associate Justices Of The Supreme Court Of The United States:

The petitioner herein, prays that a writ of certiorari issue to review the judgment of the 4th Court of Appeals and the Supreme Court of the State of Texas entered in the above-entitled cause on the 13th day of September, 1989.

OPINIONS BELOW

The opinion of the Fourth Court of Appeals of Texas is reported at 764 S.W.2d 338 and is printed in Appendix A herein. The Texas Supreme Court denied a Writ of Error and the Motion for Rehearing was denied September 13, 1989, making judgment final.

JURISDICTION

Judgment became final on September 13, 1989. This Petition was filed within 60 days. The jurisdiction of the Supreme Court is invoked under Supreme Court Rule 17 (c) and 28 U.S.C. 1257.

STATEMENT OF THE CASE

Suit was filed by Appellant, John Yiamouyiannis, a Ph. D. in biochemistry. He sued Paul Thompson, San Antonio Express News, Bexar County Medical Society, and Dr. Randall Priessig, Appellants. The suit alleged that defendants agreed and conspired to falsely defame and did defame the character, motives, and reputation of plaintiff. Defendants' motive was to avoid debating scientific facts, which they did not dispute. They intentionally raised the issue of Plaintiff's qualifications in order to conceal and cloud the real issues. They published false, libelous, and defamatory statements concerning plaintiff's reputation and qualifications as an expert on the fluoridation of public water supplies. In the suit, Plaintiff also alleged negligence, malice, violation of Section 39.02 of the Texas Penal Code, Section 1983 of 42 USCA, and tortious interference with Plaintiff's right to free speech and public debate. The Trial Court denied Appellant his right of discovery, and then granted sum-

mary judgment for the press defendants solely on the basis of the pleadings. The Court of Appeals held that the false statements were "expressions of opinion" protected by the first amendment. Ironically the summary judgment was based upon an alleged first amendment privilege to libel and defame Plaintiff, solely because Plaintiff exercised his first amendment right to speak out on the undisputed facts concerning fluoridation.

Petitioner, John Yiamouyiannis, seeks this Writ of Certiorari. For Summary Judgment purposes the facts alleged in his petition must be assumed to be true. In November of 1985, San Antonio was to have an election concerning fluoridation of its public water supply. Dr. John Yiamouyiannis became involved as an expert. He is a Doctor in Biochemistry. He was asked to publicize the scientific facts at issue. He "enjoyed a good reputation in his field, in his business, and in general. He knows the subject of fluoridation of public water supplies, and he honestly presents the facts." (TR 26) At some time prior to October, 1985, Defendant, Bexar County Medical Society, and Randall Preissig, M.D., agreed that during the fluoride campaign, the scientific issue would not be debated, that instead only conclusions would be repeated that fluoride in the water supply was effective and safe. Defendants agreed that when Plaintiff sought to discuss the scientific evidence a collateral attack would be made upon his motives, character, reputation, in order to cloud the issue. Dr. Randall Preissig and Paul Thompson agreed to be the spokesmen for the Medical Society. They were authorized and instructed to carry out the strategy. (TR 27-28) Defendants maliciously carried out this plan by publishing in the newspapers, on

TV, and by other written and oral means, untrue and defamatory "opinions" about Dr. Yiamouyiannis. They called him a "quack", making untrue statements about his past, stating he was a "hoke artist", "fearmonger", denying his credentials and denying that he deserved respect, stating that he engaged in "incomprehensible mumbo jumbo", that he has "been exposed for quackery", (TR 26) stating that he was "the head of an institution that opposed the small pox vaccine, that opposed polio vaccine, that opposed pasteurization of milk" (TR 28-29). All of the above "opinions" were false and were intentionally and maliciously made with the intent to harm Plaintiff's reputation and credibility, and to avoid discussion of the relevant fact issues.

Defendants conceded that the scientific issues are not a matter of legitimate dispute. Fluoride is a poison, and small amounts in the public water supply are not safe and are not effective in preventing tooth decay. This fact is relevant to this case. Defendants did not contest the relevant facts, therefore Plaintiff's qualifications did not legitimately come into issue. It is axiomatic that where facts are undisputed, the qualifications of the expert do not become an issue. Defendants claimed that Dr. Yiamouyiannis was unqualified, dishonest, and engaged in "quackery" only because he presented undisputed proof that fluoridation of public water supplies has not been proven safe or effective in reducing tooth decay. It is ironic that Defendants defamed and libeled Plaintiff in order to chill Plaintiff's right to free speech, then Defendants contend that their own right to free speech gives them a privilege to falsely malign Plaintiff and to deceive the public. Defendants contend from one side of their mouth that they have the right to "chill"

Plaintiff's freedom of speech by giving false facts and false opinions concerning his character and reputation, while out of the other side of their mouth they say the court cannot chill Defendants' free speech by requiring that their facts be true or reasonable.

Defendants' filed motions for summary judgment. (TR 91, 94) The motions are based solely upon the pleadings. (TR 91, 94) The motions contend that all statements complained of by the Plaintiff are constitutionally protected as statements of opinion, not statements of fact. (TR 91, 94)

Plaintiff's response showed that the statements complained of were statements of fact, were not limited to the newspaper article, and included both the newspaper article and other statements made. Plaintiff also complained of a conspiracy to raise a false issue by misrepresenting Plaintiff's qualifications. (TR 96-97) Plaintiff alleged that the statements were false statements of fact designed to discredit Plaintiff. (TR 97) Appellant also alleged malice, negligence, and various statutory violations. (TR 29)

The lower Courts held most statements to be expressions of opinion and granted Defendants' Summary Judgment on November 6, 1987. (TR 102)

False statements that a person is incompetent or corrupt, *Rinaldi v. Holt*, 366 N.E.2d 1299, that a person does not have professional capacity for his profession *Sewell v. Brookbank*, 581 P.2d 267, charges of actual dishonesty, want of integrity or unprofessional conduct *Ratner v. Young*, 465 F.Supp. 386, and allegations that a person or organization had seriously harmed the health

of those who sought its help, *Church of Scientology v. Minn. State Medical Assn. Foundation* 264 N.W.2d 152 have all been held to be defamatory, libelous and actionable.

Where the alleged defamatory statements are unambiguously fact, or where the alleged statements could be either fact or opinion, the Court cannot say as a matter of law that the statements were not understood as fact, and there would therefore be a triable issue for the jury. *Bindrim v. Mitchell,* 92 Cal. App. 3d 61, 155 Cal. Rptr. 29, *Gregory v. McDonald Douglass Corp.*, 552 P.2d 425, *Good Gov. League v. Group of Seal Beach Inc.*, 586 P.2d 572.

In our case the statements were intentionally designed to divert the public from the factual issues and to discredit and harm Plaintiff's reputation by misrepresenting facts concerning his background, integrity and qualifications. It is verifiable whether or not Plaintiff is a "hoke artist". Plaintiff's "credentials" are verifiable. Whether or not Plaintiff was "exposed for 'quackery' by the prestigious national consumer reports" is clearly verifiable. ". . . quack like Ohio biochemist John Yiamouyiannis", "fearmonger like Ohio biochemist John Yiamouyiannis . . ." are verifiable statements, and therefore not opinion.

The Court of Appeals relied upon *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 789 (1974). The lower court says Gertz "establishes an absolute constitutional privilege for expressions of opinion." (page 4 of Opinion) The lower court held in effect that even though the publication was not the true opinion of the defendant, and even though it was

an opinion maliciously published for the purpose of smearing person's reputation, it is privileged. *The U. S. Supreme Court did not say this in Gertz.*

Defendants also relied upon *El Paso Times v. Kerr*, 706 S.W.2d 797 to support this summary judgment. The test as set out in that case was:

> 1. The Court should analyze the common usage of the specific language aimed at determining if there is a precise meaning for which a consensus of understanding exists.
>
> 2. The court should consider the statement's verifiability. Can the statement be objectively characterized as true or false? If it cannot be verified, then the trier of fact could not return a verdict to a special issue questioning the truth of the statement (because truth is always a defense in a libel action).
>
> 3. The court should consider the full context of the statement to determine if the language surrounding the statement would influence the reader's readiness to infer factual content in the specific language used.
>
> 4. The broader context or setting in which the statement appears should be analyzed.

Applying the above test in the Kerr case, the Court holds that the term "cheating" does not have a precise meaning and that is not likely that a reader assumed that the author had undisclosed facts to back up the statement. The Court states "this is material because even a statement of opinion will not be protected if it is couched in such a way to imply that the author possesses undisclosed facts." (page 799). In Dr. Yiamouyiannis' case a reader would certainly assume that the author

had undisclosed facts to back up the attack made on the qualifications, honesty and integrity of Plaintiff. It certainly can be verified that Plaintiff is not a "quack", that he is not a "fear-monger", that he is not opposed to pasteurization of milk and vaccination for small pox, that he is not unqualified to render an opinion on the safety of fluoride in the public water supplies, that he does not "engage in quackery", that he is qualified by education and experience to speak as an expert on fluoridation, and that he does not "gush incomprehensible mumbo jumbo". Further the intent of defendants to discredit Plaintiff and damage his reputation was not only obvious from the statements, but WAS A MATTER OF PRIOR AGREEMENT in order to deny him the forum represented by the radio talk show.

Therefore the Kerr case taken in its full context supports Plaintiff's position that the statements whether fact or opinion are actionable, and the summary judgment should be reversed.

Further Appellees failed to meet their summary judgment burden of proof by failing to prove that Appellant was a public figure, that the statements were true, absence of malice, privilege, absence of negligence, and absence of conspiracy. *Poe v. San Antonio Express News,* 590 S.W.2d 537.

In order to prove Appellees' intentions and malice and to prove the conspiracy, Appellant submitted requests for admissions. (TR 14, 33, 35, 38, 74) It would have been a simple matter for Appellants to admit or deny the request or deny them upon the basis that they did not know the facts. Instead of admitting, denying

or admitting that they did not know, appellants' moved to quash the admissions, claiming they were irrelevant. (TR 21, 43, 83, 86) The Court granted the motion and refused to allow Appellant his discovery. (TR 57, 82)

REASONS FOR GRANTING WRIT

Truth should always be the objective of the Courts and the efforts of the media. Hyperbole, opinion, and form should not be used to conceal the truth, nor should the Courts and the media condone deceit because it is politically expedient. The Courts should not create an artificial distinction between fact and opinion which promotes deceit. All statements of fact can be called "opinion". By refusing to admit or deny Plaintiff's requests for admissions in the trial Court, Defendants affirmed that they have no opinion regarding Plaintiff's qualifications and integrity, and that they had no factual basis to dispute his facts or opinion concerning fluoride. Therefore Defendants' claims of an opinion concerning Dr. Yiamouyiannis' reputation must have been false. Contrary to the lower Court's opinion, there is such a thing as a false opinion.

The defamatory statements were untrue, known by Defendants to be untrue, and were intentionally and maliciously made with the intent to harm Plaintiff's reputation and credibility. (TR 27)

The Court of Appeals has based its opinion upon the *Gertz* case by the U. S. Supreme Court, but has IGNORED portions of the case. *Gertz* clearly provides that the Plaintiff can recover for injury upon clear and convincing proof that the defamatory falsehood was

made with knowledge of its falsity or with reckless disregard for the truth, and Gertz's limitations seem to apply only to punitive or exemplary damages, not to actual damages. (GERTZ, 94 Sup. Ct. Rptr. page 3012.). As stated by the U. S. Supreme Court:

> ". . . It is necessary to restrict defamation plaintiffs who do not prove knowledge of falsity or reckless disregard for the truth to compensation for actual injury."

The opinion handed down by the Texas Court of Appeals holds contrary to *Gertz,* that certain persons (Express News and Paul Thompson) have the right to maliciously and intentionally harm others by expressing an "opinion" they know to be false, baseless, and damaging, simply because they sell newspapers. Further, they have the right to conspire with others to damage a person's reputation with false "opinions" because they sell newspapers. Surely this Court does not intend to sanction this result.

If this opinion stands, then the media can with impunity conspire with others to ignore real public issues and to publish baseless and false "opinions" and maliciously destroy the reputation of any person by publishing its false and baseless "opinion" that a person is dishonest, under the control of some PAC, has no credentials, is unqualified, is a fear monger, and writes opinions that are pure hokum. Neither *Gertz* nor the first amendment intended such an illogical result.

CONCLUSION

Wherefore Petitioner prays that the judgment of the lower Court be reversed, that the case be remanded for a trial, and that Mandamus issue compelling the trial Court to deem the admission admitted or compelling the Appellees to answer the requests for admissions, and for such other relief to which Appellant may be entitled.

Respectfully submitted,

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Attorney for Petitioner

CERTIFICATE OF SERVICE

A copy of the foregoing has been delivered to Lang, Cross, Ladon, Bolderick and Green, C/O Mark Cannan and to Groce, Locke and Habdon, attorneys for Appellees on the ____ day of October, 1989.

EARLE COBB, JR.

APPENDIX A

John YIAMOUYIANNIS, Appellant,

v.

Paul THOMPSON, the Express-News Corporation, the Bexar County Medical Society and Dr. Randall S. Preissig, Appellees.

NO. 04-87-00673-CV.

Court of Appeals of Texas,

San Antonio.

December 30, 1988.

Rehearing Denied February 8, 1989.

Opponnent of drinking water fluoridation brought action alleging defamation among other things, against newspaper and its columnist, and medical society and its spokesman. The 57th District Court, Bexar County, Joe E. Kelly, J., entered summary judgment for defendants, and fluoridation opponent appealed. The Court of Appeals, Peeples, J., held that: (1) alleged statements that fluoridation opponent was quack, hoke artist, fearmonger, had been exposed for quackery, lack solid credentials, and expressed incomprehensible mumbo jumbo, were not libelous; (2) alleged statement that fluoridation opponent once headed group that opposed vaccines for smallpox and polio and pasteurization of milk was potentially defamatory; and (3) although trial court erroneously entered summary judgment on certain un-

challenged causes of action, Court could not disturb ruling, as fluoridation opponent did not assign those adverse rulings as error.

Affirmed in part; reversed and remanded in part.

APPENDIX B

Earle Cobb, Jr., San Antonio, for appellant.

Mark J. Cannan, Lang, Cross, Ladon, Boldrick & Green, Sharon E. Calloway, Groce, Locke & Hebdon, San Antonio, for appellees.

Before ESQUIVEL, BUTTS and PEEPLES, JJ.

OPINION

PEEPLES, Justice.

In this libel case, plaintiff appeals a summary judgment granted on the ground that the defendants' statements were constitutionally protected opinions and not actionable assertions of fact. Plaintiff also complains of certain discovery orders. We affirm in part and reverse and remand in part.

During a referendum campaign in 1985 to authorize fluoridated water in San Antonio, plaintiff John Yiamouyiannis publicly opposed the fluoridation effort, and defendant Paul Thompson questioned his credentials and expertise in the San Antonio Express-News.[1] Thompson

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1. Thompson's column in its entirety reads as follows:
Local radio talk shows an intellectual Sahara Almost incredibly, the ranking radio talk show hosts in San Antonio today have taken it into their heads to oppose water flouridation in the Nov. 5 referendum.
I am talking about Allan Dale of KRNN; Jud Ashmore of KBUC; Our Great Leader Ricci Ware of KTSA, and WOAI's resident pundit Carl Wiglesworth.
If anyone at all in the intellectual Sahara of Alamo City Radio supports fluoride, it is a tightly kept secret.
The four talk show hosts make a display of objectivity by now and then inviting in a proponent of the fluoride cause. But then they offset that by presenting an outrageous hoke artist and im-

called Yiamouyannis a "quack" and "an outrageous hoke artist and imported fearmonger," implied that he lacked "solid credentials," said Consumer Reports had exposed him for "quackery," and characterized his views as "in-

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ported fearmonger like Ohio biochemist John Yiamouyiannis as if he had solid credentials and deserved the same kind of respect.

The truth is our radio hosts probably don't know the difference. A couple of them treated Yiamouyiannis as if he were some kind of messiah. You could accurately say they were charmed, carried away by the well-traveled Ohio pitchman and got conned on their own radio shows.

Yiamouyiannis, exposed for "quackery" by the prestigious national Consumer Reports (he later sued Consumer Reports and lost), is the No. 1 hired gun of anti-fluoride campaigners here, and indeed, was back in town yesterday with another gush of his incomprehensible mumbo-jumbo.

The lineup

Right up and down the line, whether they admit it or not, the quartet of presiding S.A. radio forum leaders goes down as stuffy-conservative by persuasion, two of them on the redneck side.

KRNN's Dale, a septuagenarian who likes to think of himself as one of the last bastions of good old-fshioned American values, is actually a throwback. On most social issues, "Old Leather Lungs," as he's called, not always in endearment, ends up in a position to the right of the Visigoths.

KBUC's Ashmore and KTSA's Ware not too long ago were co-hosts of an arrogant wakeup show on country-western KBUC that was bitterly denounced by minority leaders as out-and-out redneck and, for a time, kept the station in hot water with the FCC.

The Ricci and Jud Show broke up last year, with Ware going on nights now at KTSA. In basic outlook and orientation, though, nothing has changed with this twosome.

As for WOAI's Wiglesworth, a bearded man with an authoritative tone but no scientific background, he had the gall to tell listeners early in the fluoride hassle that HIS OWN studies had convinced him of the rectitude of the antil-flouride cause.

Mediocrities

One by one, in describing the talk show hosts of Alamo City Radio, one can say with total assurance, "Larry King he's not."

It's true an expert like King, thoroughly backgrounded on his guests in advance, with a gimlet eye for roving mahatmas, swamis and other phonies, will not often be found in a market of this size. But we certainly deserve something better than the kind of radio forum we've got—undiscriminating hosts allowing anyone at all on

comprehensible mumbo jumbo." Defendant Bexar County Medical Society and its spokesman Dr. Randall Preissig made similar statements, using the words "quack" and "quackery" in reference to plaintiff, and asserting that he had headed an institution that opposed the pasteurization of milk and vaccines for smallpox and polio.

Yiamouyiannis brought suit for libel against Thompson, The Express-News Corporation, Preissig, and the Medical Society. Each defendant moved for summary judgment based on the pleadings on the sole ground that each of their statements were an assertion of opinion, absolutely priviledged under the First Amendment, as construed in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 94 S. Ct. 2997, 41 L.Ed.2d 798 (1974). In *Gertz*, the court gave to statements of opinion a constitutional shield against defamation lawsuits:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact.

Id. at 339-40, 94 S. Ct. at 3007.[2] According to later

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their air to spout the wackiest sort of unchecked opinionation.
Any radioman who can't spot the difference between a quack like Ohio biochemist Yiamouyiannis and authorized spokesmen for the medical, dental and research professions of the country ought to be kicked off the air.
He's a drawback, a menace to progress and correct public information, and he wouldn't be qualified to run a talk show in Moose Inn, Idaho.

2. The Court reaffirmed this statement in *Sun Corp. v. Consumers Union*, 466 U.S. 485, 504, 104 S. Ct. 1949, 1961, 80 L.Ed.2d 502 (1984), and suggested continued adherence to the fact/opinion distinction in *Hustler Magazine v. Falwell*, 485 U.S. _____, 108 S. Ct. 876, 99 L.Ed.2d 41 (1988).

cases, this statement establishes as absolute constitutional privilege for expressions of opinion. *See Ollman v. Evans,* 750 F.2d 970, 974-75 n. 6 (D.C. Cir. 1984) (en banc), *cert. denied,* 471 U.S. 1127, 105 S. Ct. 2662, 86 L.Ed.2d 278 (1985); *Brasher v. Carr,* 743 S.W.2d 674, 678-79 (Tex. App.—Houston [14th Dist.] 1987, writ granted); *City of Dallas v. Moreau,* 718 S.W.2d 776, 780 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); *El Paso Times, Inc. v. Kerr,* 706 S.W.2d 797, 798 (Tex. App.—El Paso 1986, writ ref'd n.r.e.), *cert. denied,* 480 U.S. 932, 107 S. Ct. 1570, 94 L.Ed.2d 761 (1987).

[1] Where to locate the boundary between absolutely privileged opinions and actionable assertions of fact is a question of law for the court. *See El Paso Times, Inc. v. Kerr, supra* at 800 (citing cases). This law question may be resolved at trial or raised, as in this case, in a summary judgment hearing at which the court decides whether, in the words of TEX.R.CIV. P. 166a(c), "the moving party is entitled to judgment as a matter of law" under *Gertz.*

The line between opinions and statement of fact is not always distinct. The court in *Ollman v. Evans, supra,* proposed a four-part inquiry that was applied by the Texas courts in *El Paso Times v. Kerr and Brasher v. Carr, supra.* We consider the Ollman analysis helpful. In distinguishing between fact and opinion, the court should (1) analyze the common usage of the specific language to determine whether it has a precise, well understood core of meaning that conveys facts, or whether the statement is indefinite and ambiguous; (2) assess the statement's verifiability, that is, whether it is objectively capable of being proven true or false; (3)

consider the entire context of the article or column, including cautionary language; and (4) evaluate the kind of writing or speech as to its presentation as commentary or "hard" news. 750 F.2d at 978-84. This inquiry should help determine, for example, whether the statement is to be taken as precise and literal or loose and figurative, and whether the language is employed as metaphor or hyperbole, or to convey actual facts.

[2] Under these principles, the references to Yiamouyiannis as a quack, a hoke artist, and a fearmonger are assertions of pure opinion, as are the statements that he was exposed for quackery, lacks solid credentials, and expresses incomprehensible mumbo jumbo. These terms of derision, considered in context and in light of the fluoridation debate, are vintage hyperbole, and are not capable of proof one way or the other. They are the speaker's shorthand way of opining that Yiamouyiannis is not worthy of belief, his views are confused nonsense, and he is not qualified to instruct the public about fluoridation. While other commentators might have taken a more ratiocinative approach, the defendants were entitled to use instead these particular terms of invective in this context. As to each of these utterances, the absolute constitutional privilege applies, and summary judgment was proper as to plaintiff's libel claims and his libel-related counts sounding in negligence and conspiracy.

[3] We believe this decision is true to the First Amendment values reflected in *Gertz*. When the topic is a public issue such as the fluoridation of drinking water, speakers may express their opinions about their opponents' views and qualifications without having to prove the substantial "truth" of those opinions to a jury

in a defamation case. Our holding also recognizes the limitations of the legal process, which is ill-suited to determine what is and is not quackery, hokum, and mumbo jumbo, even with such tools as broad discovery, expert testimony, and finely-crafted jury questions and definitions.

[4] But Preissig's declaration that Yiamouyiannis once headed a group that opposed vaccines for smallpox and polio and pasteurization of milk is a specific claim about plaintiff's actions in the past. Unlike the other subjective statements, it can easily be proven true or false. We hold that this assertion of fact is unsheltered by the Gertz privilege for opinions, which was the sole ground urged by the defendants. Whether Preissig's words are defamatory in the first place, and whether they are true, are issues not raised by any of the motions for summary judgment.

[5] In addition to the libel-related claims, plaintiff pleaded that the defendants used "official oppression" to keep him off radio and television. This, plaintiff's petition contends, violates section 39.02 of the Penal Code and 42 U.S.C. § 1983, and constitutes a tortious interference with his right to free speech. The summary judgment before us orders that plaintiff take nothing on the entire case, including these three non-defamation counts, even though they were not addressed by any of the motions for summary judgment. The court erred in ruling on these unchallenged causes of action. *Chessher v. Southwestern Bell Tel. Co.*, 658 S.W.2d 563, 564 (Tex. 1983) (Because motion for summary judgment challenged only one of four pleaded causes of action, take-nothing judgment on the three unchallenged causes

was improper). But plaintiff has not assigned these adverse rulings as error in this court, and therefore we cannot disturb them. *Prudential Ins. Co. v. J.R. Franclen, Inc.*, 710 S.W.2d 568, 569 (Tex. 1986); *Gulf Consol. Int'l, Inc. v. Murphy*, 658 S.W.2d 565, 566 (Tex. 1983).

Plaintiff complains further of a protective order that sustained objections to his request for admissions concerning the factual basis for the defendants' opinions and the merits of fluoridated water. In light of our holdings about plaintiff's claims, most of the requests for admissions are clearly irrelevant. Upon remand the scope of discovery will be determined by the trial court in the exercise of its discretion.

For the reasons stated, we affirm the judgment that plaintiff take nothing against defendants Thompson and the Express-News. We affirm the judgment that plaintiff take nothing against defendants Preissig and the Medical Society, with the sole exception of the libel and libel-related causes of action based on the statement of fact concerning polio, smallpox, and pasteurization measures, as to which the judgment is reversed and remanded.

SUPREME COURT OF TEXAS
P.O. Box 12248
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Austin, Texas 78711
John T. Adams, Clerk

September 13, 1989

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RE: Case No. C-8433

STYLE: JOHN YIAMOUYIANNIS
v. PAUL THOMPSON ET AL.

Dear Counsel:

Today the Supreme Court of Texas overruled Petitioner's motion for rehearing of the application for writ of error in the above styled case.

Respectfully yours,

John T. Adams, Clerk

By: _____
(Signature Illegible)
Deputy

No. 89-673

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Respondents

On Petition for a Writ of Certiorari to the Supreme Court of Texas

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BRIEF IN OPPOSITION OF RESPONDENTS BEXAR COUNTY MEDICAL SOCIETY AND DR. RANDALL PREISSIG

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QUESTION PRESENTED

The only question presented is:

Whether the Texas intermediate appellate court incorrectly applied the *Gertz* privilege of constitutionally protected opinion to the statements at issue in this case?

LIST OF PARTIES

1. John Yiamouyiannis
2. Paul Thompson
3. Express News
4. Bexar County Medical Society
5. Dr. Randall Preissig

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On Petition for a Writ of Certiorari to the Supreme Court of Texas

---

BRIEF IN OPPOSITION OF RESPONDENTS BEXAR COUNTY MEDICAL SOCIETY AND DR. RANDALL PREISSIG

Respondents Bexar County Medical Society and Dr. Randall Preissig respectfully request that this Court deny the petition for writ of certiorari seeking review of the opinion of the Fourth Court of Appeals of Texas. That opinion appears in the Appendix to the Petition for Writ of Certiorari and is reported at 764 S.W.2d 338 (Tex. App.—San Antonio 1988, writ denied).

CONSTITUTIONAL PROVISION INVOLVED

Petitioner failed to set forth the First Amendment to the United States Constitution, which is at issue in this appeal and which provides, in pertinent part:

> Congress shall make no law . . . abridging the freedom of speech, or of the press. . . .

STATEMENT OF THE CASE

The lower court's opinion, which is appended to the Petition for Writ of Certiorari, correctly describes this summary judgment case; however, Petitioner's Statement of the Case contains some inaccuracies and omissions which merit correction. Although the merits of fluoridation of water are entirely irrelevant to this petition, it is a complete misstatement to say that Defendants ever conceded the scientific issue that fluoride is a "poison" and further to imply that defendants therefore could have had no "opinion" contrary to the position of Yiamouyiannis.

In addition, Petitioner fails to make clear what language the intermediate Texas appellate court held to be constitutionally protected opinion and what language it held to fall outside opinion, necessitating a reversal of part of the summary judgment and remand for trial. The court held that the use of the terms "quack," "quackery," "outrageous hoke artist," "imported fearmonger," lack of "solid credentials" and "incomprehensible mumbo jumbo" were vintage hyperbole expressing an opinion not capable of proof; therefore, an absolute constitutional privilege applied. *Yiamouyiannis v. Thompson*, 764 S.W.2d 338, 341 (Tex. App.—San Antonio 1988, writ denied). The court specifically exempted from constitutional protection the statement that Yiamouyiannis once headed a group that opposed vaccines for smallpox and polio and pasteurization of milk because such was a verifiable statement that could easily be proven true or false. *Id.* at 341. Throughout the petition, Yiamouyiannis uses this statement as part of his argument that this Court should grant review because the state appellate court improperly applied *Gertz*. The Texas appellate court did not improperly apply *Gertz*; rather, it properly distinguished factual statements which could constitute defamation from constitutionally protected opinion which is not actionable as defamation.

REASONS FOR DENYING PETITION FOR WRIT OF CERTIORARI

I. The decision of the Texas appellate court partially affirming the summary judgment does not conflict with decisions of this Court or other federal circuit courts interpreting constitutionally protected opinion under *Gertz*.

A. *The lower court correctly applied the test for constitutionally protected opinion.*

Although Respondents would not disagree with the statement that "truth should always be the objective of the courts and the efforts of the media," it is not a reason for granting certiorari in this case. The question is whether the intermediate Texas appellate court applied the constitutional privilege accorded opinion in *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), in such a way as to conflict with an opinion of this Court or any other federal court of appeal. Petitioner has cited no opinions with which the Texas court's opinion conflicts; nor has Respondents' research located any. To the contrary, many cases, both state and federal, support the Texas court's application of the *Gertz* privilege to use of the terms quackery, hoke artist, fearmonger, lacking in solid credentials, and incomprehensible mumbo jumbo.

The starting point for the Texas appellate court's analysis was the following *Gertz* statement of the privilege accorded opinion:

> Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas.

Supra at 339-40.

The lower court then analyzed this opinion privilege under a fairly widely adopted test set forth in a D.C.

Circuit Court of Appeals case upon which writ of certiorari was denied by this Court. *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985); *see also City of Dallas v. Moreau*, 718 S.W.2d 776 (Tex. App.—Corpus Christi 1986, writ ref'd n.r.e.); *El Paso Times, Inc. v. Kerr*, 706 S.W.2d 797 (Tex. App.—El Paso 1986, writ ref'd n.r.e.), *cert. denied*, 480 U.S. 932 (1987).

Petitioner set forth the four-step test in his petition at page 7. A shorthand method of describing the four steps would be:

(1) common usage or precise meaning

(2) verifiability

(3) immediate context

(4) broader social context

Those statements that the court held to be constitutionally protected opinion are such under each of the above criteria and are supported by ample case law. This Court's opinion in *Old Dominion Branch No. 496, National Association of Letter Carriers v. Austin*, 418 U.S. 264 (1974), is illustrative of the first step of the test. In that case, this Court characterized the term "fascist" as a use of loose, figurative language or an undefined slogan, which was not a fact and therefore not actionable. *Id.* at 284; *see also Good Government Group of Seal Beach, Inc. v. Superior Court of Los Angeles County*, 586 P.2d 572 (Cal. 1978) (statements like "chicanery and machinations" and "infamy" are terms often used in a spirited debate where the integrity and motives of rivals are attacked and defended and are therefore opinion, not fact), *cert. denied*, 441 U.S. 961 (1979).

The *Ollman* court demonstrated the second step of the test, verifiability, with the following example. An evaluative statement like "Jones is a despicable politician" reflects the author's political, moral or aesthetic views and

not the author's sense perceptions. An example of a sense perception which is a recitation of facts would be "Jones had ten drinks at the office and then sideswiped two cars on the way home." *Ollman*, *supra* at 978. The first statement about Jones' political abilities cannot be objectively characterized as true or false, any more than the statements in this case concerning Yiamouyiannis' position on the merits of fluoridation can be. *See Hotchner v. Castillo-Puche*, 551 F.2d 910, 913 (2d Cir.), *cert. denied sub nom. Hotchner v. Doubleday & Co.*, 434 U.S. 834 (1977) ("toady hypocrite" and "two-faced person whom Hemingway did not trust" were not assertions that could be proved true or false; therefore, could not be libelous). Those statements held by the lower court to be protected opinion are evaluative statements expressing an opinion on Yiamouyiannis' political stance on a public issue and are therefore not defamation.

As a third step, the full context in which the statements were made is considered. In *Greenbelt Cooperative Publishing Association v. Bresler*, 398 U.S. 6 (1970), a newspaper article described a land developer's negotiating technique at a city council meeting as "blackmail." This Court held that the statement "blackmail" was clearly the author's use of rhetorical hyperbole to express his personal opinion or characterization of what he considered to be unreasonable behavior on the plaintiff's part. *Id.* at 14. As the lower court noted in the instant case, the article in question is filled with rhetorical hyperbole and figurative language, which is used in an attempt to persuade the reader to Thompson's point of view and which is not capable of proof one way or the other. The very use of hyperbole signals to a reader that opinion is being communicated and not verifiable facts. *Mr. Chow of New York v. Ste. Jour Azur S.A.*, 759 F.2d 219, 228 (2d Cir. 1985).

The fourth and final step is to consider the broader social context in which the statement appears. Again, this

Court's opinion in *Letter Carriers, supra,* is a good example of this stage of the analysis. In *Letters Carriers,* a union published in its monthly newsletter under the heading of "List of Scabs" the names of those who had not joined the union. A Jack London definition of "scab" as a traitor to God, his country, his family, and his class was also given. *Id.* at 267-78. This Court held that the definition of "scab" could not be construed as a representation of fact because in the give-and-take of economic and political controversies, such expressions were often used in the figurative sense to demonstrate one party's strong disagreement with the views of its opposition. Even though very pejorative, the use of the term "scab" reflected a difference of opinion and, thus, was protected by the First Amendment. *Id.* at 284; *see also* Note, *Fact and Opinion After Gertz v. Robert Welch, Inc.: The Evolution of Privilege,* 34 Rutgers L. Rev. 81, 111, 117 (1981) (in context of a public dispute, audience can place such exaggerated positions in perspective or at least view them with a degree of skepticism as attempt to persuade to certain viewpoint). Undeniably, the referendum debate on whether flouride should be added to San Antonio's drinking water supply was a heated debate—a context in which the average reader expected that each side would attack the other in an effort to win over converts and voters. *See Rinsley v. Brandt,* 700 F.2d 1304, 1309 (10th Cir. 1983) (society has chosen to protect as opinion free and heated debate about matters of social concern). In sum, the Texas intermediate appellate court correctly analyzed and applied the *Gertz* privilege for opinion and correctly separated actionable fact from nonactionable opinion in its review and partial affirmance of the trial court's summary judgment.

B. *Because as a matter of law opinion cannot constistitute defamation, the issues of absence of malice, truth as a defense, and public figure standard were properly never reached by the lower court.*

Petitioner also attempts to argue that defendants did not meet their summary judgment burden of proof because they failed to prove that Yiamouyiannis was a public figure, that the statements were true, and that there was no malice, no negligence and no conspiracy. As an initial matter, the Texas court of appeals held that Petitioner waived any appellate complaints regarding causes of action for negligence or conspiracy by failing to assign points of error to such. *Yiamouyiannis, supra* at 341-42. Second, defendants did not have a burden to show that Yiamouyiannis was a public figure or that the statements were true because such issues were never reached. The decision that the *Gertz* privilege protects opinion statements is a threshold one, the result of which is a determination as a matter of law that no defamation exists. Thus, there is no reason to determine the standard—be it public figure or private person—to be applied to a defamation cause of action. Similarly, there is no reason to establish the defense of truth to a cause of action for defamation, which as a matter of law is not actionable.

Last, Respondents need not have established the absence of malice because that issue also is not reached. Petitioner confuses the absolute privilege of *Gertz* with a conditional privilege, which may be overcome by a showing of malice. The constitutional protection afforded opinion by *Gertz* is absolute and is not overcome by malice, as was made clear in *Hustler Magazine v. Falwell*, 485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41, 49-50 (1988).

II. This Court has previously answered all of the "Questions Presented" by Petitioner in such a way that denial of this Petition for Writ of Certiorari is undeniably warranted.

Petitioner attempts to argue that defendants did not disagree with Yiamouyiannis' opinions regarding flouride and therefore by publishing statements critical of his position had published a "false" opinion. First, the record in no way reflects that defendants agreed with his position; nor in fact did they. Second, the question of motive behind the opinion is not an inquiry under *Gertz* or the *Ollman* test for applying the *Gertz* privilege. This Court has plainly answered Petitioner's first two questions regarding whether *Gertz* absolutely protects opinion and whether false opinion can be published. *Gertz* states there is no such thing under the First Amendment as a false idea—"idea" having been subsequently and widely interpreted to be synonymous with the term "opinion."

Petitioner's third and fourth questions regarding whether *Gertz* allows publication of opinion statements regardless of malice was answered by this Court in *Hustler Magazine v. Falwell* in the following manner:

> But in the world of debate about public affairs, many things done with motives that are less than admirable are protected by the First Amendment. In *Garrison v. Louisiana*, 379 U.S. 64 (1964), we held that even when a speaker or writer is motivated by hatred or ill-will his expression was protected by the First Amendment.
>
> * * * *
>
> At the heart of the First Amendment is the recognition of the fundamental importance of the free flow of ideas and opinions on matters of public interest and concern. The freedom to speak one's mind is . . . essential to the common quest for truth and the vitality of society as a whole.

485 U.S. 46, 108 S. Ct. 876, 99 L. Ed. 2d 41, 49-50 (1988).

Petitioner's final question assumes facts which neither exist in this case, nor are they relevant; and more importantly, it is not a question for judicial resolution since courts of law have never undertaken to declare what can and what cannot be a public issue.

CONCLUSION

Yiamouyiannis' Petition for Writ of Certiorari should be denied. The Texas court of appeals did not err in holding that certain statements were constitutionally protected opinion; nor is the lower court's decision clearly contrary to any rulings of this Court. Respondents Bexar County Medical Society and Dr. Randall Preissig, therefore, respectfully pray that the Petition for Writ of Certiorari be denied.

Respectfully submitted,

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No. 89-673

In The

Supreme Court of the United States

October Term of 1989

JOHN YIAMOUYIANNIS

Petitioner,

vs.

PAUL THOMPSON, EXPRESS NEWS, BEXAR COUNTY MEDICAL SOCIETY and DR. RANDALL PRIESSIG

Respondents.

On Petition For A Writ of Certiorari To The Texas Court of Appeals For The Fourth Supreme Judicial District

BRIEF OF RESPONDENTS, THE EXPRESS-NEWS CORPORATION and PAUL THOMPSON

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BRIEF OF RESPONDENTS, THE EXPRESS-NEWS CORPORATION and PAUL THOMPSON

Respondents Paul Thompson and The Express-News Corporation respectfully request this Court to deny the Petition for Writ of Certiorari, seeking review of the opinion of the Texas Court of Appeals, Fourth Supreme

Judicial District, in this case. That opinion is reported at 764 S.W.2d 338.

STATEMENT OF THE CASE

The Petitioner's claims against these Respondents, newspaper columnist Paul Thompson and his publisher, The Express-News Corporation, are based upon a newspaper column published in the San Antonio *Express-News* edition of October 25, 1985 [attached to Petitioner's Original Petition and set out verbatim in the opinion below]. As outlined in the column itself, it was written in the context of an upcoming voter referendum on fluoridation of the local water supply and was responsive to positions taken and views expressed by the Petitioner and others on the local broadcast media, views that were in opposition to the proposed fluoridation.

Petitioner brought suit against the columnist and the newspaper and additionally against the Bexar County Medical Society and its then president, proponents of fluoridation. Although various peripheral "causes of action" were referenced in the Petitioner's lawsuit, the basic thrust directed to the newspaper and its columnist was the allegedly defamatory column of October 25, 1985, attached to and incorporated in the Original Petition.

The trial court granted motions for summary judgment filed by all Defendants. The Court of Appeals in reviewing the publication in question found that the complained of statements were properly resolved by summary judgment in that they were protected statements of opinion. With respect to the Medical Society and Dr.

Preissig, it found that one alleged statement (not made or repeated in the newspaper column) had a factual basis and remanded the case to the trial court for further consideration of the cause of action against those Defendants based upon that statement. The Petitioner's Application for Writ of Error to the Supreme Court of Texas was denied.

REASONS WHY THE PETITION SHOULD BE DENIED

I. THE COURT OF APPEALS CORRECTLY HELD IN ITS WELL-REASONED OPINION THAT THE COMPLAINED OF STATEMENTS IN THE NEWSPAPER COLUMN WERE PROTECTED STATEMENTS OF OPINION UNDER THE CONSTITUTION AND ESTABLISHED CASE LAW.

It is now well established that, no matter how vigorously stated, expressions of opinion are constitutionally protected. "Under the First Amendment there is no such thing as a false idea." *Gertz v. Robert Welch, Inc.*, 418 U.S. 323, 329 (1974).

Whether viewed under the standards applied prior to *Gertz* in cases such as *Greenbelt Cooperative Publishing Ass'n v. Bresler*, 398 U.S. 6 (1970), or subjected to the four factor analysis of *Ollman v. Evans*, 750 F.2d 970 (D.C. Cir. 1984), *cert. denied*, 471 U.S. 1127 (1985), the newspaper column authored by Respondent Thompson and published by Respondent Express-News was a matter of opinion regarding the Petitioner from which no liability could or should arise.

In *Greenbelt* it was significant that the publication concerned "matters of local governmental interest and importance," thus signifying that the "very subject matter" was "of particular First Amendment concern." 398 U.S. at 11. Here also, similar matters of governmental interest were at the heart of the publication, the column on its face referencing the upcoming "water fluoridation . . . referendum."

Although one might agree with the observation of the Court below that the approach of the writer was not the most "ratiocinative," it is no less protected under the First Amendment, akin to the "rhetorical hyperbole" and "vigorous epithet" of *Greenbelt*. *Id.* at 14. In *Greenbelt*, such language was a response to what was perceived to be an unreasonable position by the other side in a public debate. Here also the newspaper column was in response to radio broadcasts of what was in the column labeled as the Petitioner's "wack[y] opinionation." Clearly the subject matter of the column was the very issue before the voters, i.e. fluoridation. The language used, – incomprehensible mumbo jumbo, quack, hoke artist and fearmonger – was in the context of that ballot issue of fluoridation and by any reasonable reader would have been understood as a characterization of the writer's opinions in that area and the writer's endorsement of a viewpoint. Indeed, the language relating to the Petitioner and his views was entirely consistent with the tone used in the column to characterize the views of the anti-fluoridation broadcasters upon whose programs the Petitioner appeared. That context reinforced the view of any reasonable reader that conflicting *opinions* were at issue. Clearly this view of the context in which the statements

are made should be and is a strong determinative factor in the analysis. *See Old Dominion Branch 496, Nat'l Ass'n of Letter Carriers v. Austin*, 418 U.S. 264 (1974).

That issue of context is central to two portions of the four factor analytical process described in *Ollman*. A look at both the "language surrounding the alleged defamatory statement" as it influences the average reader and "the broader context or setting," 750 F.2d at 979, refocuses attention upon the "intellectual Sahara" language of the headline/title of the column and the contested fluoridation issue before the voters.

Aside from the contextual aspects, the common usage or meaning of language and its verifiability are the other prongs of the *Ollman* analysis. *Id.* Here, the language used is clearly of an indefinite and ambiguous nature. For example, the term "quack" or "quackery" in the context of dispute over medical/scientific qualifications has been found to have no precise meaning. *See Kirk v. Columbia Broadcasting System*, 14 Med. L. Rptr. 1263, 1266 (N.D. Ill. 1988).[1] "Hoke" is a slang word meant variously "to flatter or speak insincerely . . . ; to kid a person; to refuse to consider seriously, to make light of; to do something in an affected overly sentimental, insincere or silly way." DICTIONARY OF AMERICAN SLANG 262 (1960). "Fearmonger" is not defined, but "fear" is an "unpleasant often strong emotion caused by anticipation or awareness

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[1] For background on the various claims and counterclaims that arise in the context of fluoridation debate see *Yiamouyiannis v. Consumers Union, Inc.*, 619 F.2d 932 (2d Cir.), *cert. denied*, 449 U.S. 839 (1980).

of danger . . . [or] anxious concern . . . [or] profound reverence and awe . . . [or] reason for alarm." WEBSTER'S NEW COLLEGIATE DICTIONARY 419 (1977). As for "mumbo jumbo" it has no apparent common usage or meaning that could any way subject it to verifiability. Thus, in each instance the language complained of, particularly in the context presented, offers nothing but the unverifiable viewpoint and opinion of the writer, albeit vituperatively expressed.

Only a brief response need be made to Petitioner's assertion that the opinion of the Respondents is not entitled to First Amendment protection because it is in some fashion a "false opinion" since allegedly not actually believed by the Respondents. Characterization of matter as opinion necessarily precludes further inquiry into motivation or knowledge. To allow inquiry into motivation behind opinion in order to determine liability would condition liability on an evaluation of the opinion, precisely the evil for which the Constitutional protection is designed. See RESTATEMENT (SECOND) OF TORTS (1977) §566, comment c.

Inquiry into the relationship between news and opinion and the underlying interests and beliefs of the writers and publishers is best left to continuing discussion among and the introspection of journalists. *See* E. LAMBETH, COMMITTED JOURNALISM 70 *et seq.* (1986).

II. THE COURT OF APPEALS CORRECTLY HELD THAT ERROR NOT PRESENTED TO IT WAS WAIVED.

To the extent that the Petitioner complains of non-defamation related causes of action, i.e. that there was some type of conspiracy to deny him his First Amendment free speech rights, those matters were resolved by the Court of Appeals on the basis that the Petitioner had not perfected any appeal on those points and had thereby waived them. In so ruling, the Court relied upon well established Texas law. *Prudential Ins. Co. v. J. R. Franclen, Inc.*, 710 S.W.2d 568 (Tex. 1986); *Gulf Consol. Int'l, Inc. v. Murphy*, 658 S.W.2d 565 (Tex. 1983).

Equally well established is the principle that this Court "will not review judgments of state courts that rest on adequate and independent state grounds." *Herb v. Pitcairn*, 324 U.S. 117, 125 (1945).

Here, the basis for the resolution of the matter on the basis of state law was not only clear from the case law, but clearly set out in the opinion of the Court of Appeals. Since no error was assigned in the lower Court to any complaint other than the Petitioner's disagreement with the characterization of the statements in the newspaper article as opinion, nothing else is before this Court as it relates to the Respondent newspaper and newspaper columnist.[2]

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[2] Petitioner's Application also makes reference to denial of his right of discovery. Although this also was dealt with adequately by the Court below, it in any event has no reference to these Respondents since the discovery in question (indeed all discovery initiated) was directed to Respondents Preissig and the Medical Society.

CONCLUSION

For the reasons set forth, Respondents Paul Thompson and The Express-News Corporation pray that the Petition for Writ of Certiorari be denied.

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